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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN TAFOYA,

Defendant and Appellant.

2d Crim. No. B204589
(Super. Ct. No. KA079102)
(Los Angeles County)

Juan Tafoya appeals the judgment following his conviction for first degree murder. (Pen. Code, §§ 187/189.)¹ The jury found true allegations that he personally used, discharged, and caused death with a firearm. (§ 12022.53, subds. (b)-(d).) Tafoya was sentenced to prison for two consecutive 25 years to life terms for the murder and discharge of a firearm causing death. He contends the trial court erred by denying his motion to suppress statements made to undercover sheriff's deputies, by failing to order further jury deliberations after a juror questioned the verdict during jury polling, and by denying his petition for release of juror identification information. We affirm.

FACTS

In August 2006, Mary Ann Olivas was living with her adult daughter Deserie Gandara and Olivas's nine-year-old daughter Lynia. Gandara had previously

¹ All further statutory references are to the Penal Code unless otherwise stated.

lived with a man named Gabriel. Olivas did not like Gabriel and they often argued. Tafoya was a good friend of Gabriel, and Gandara knew him as "Juan."

On August 12, 2006, Tafoya knocked on the door of the Olivas home. When asked who was there, Tafoya identified himself as "Juan." Nine-year old Lynia opened the door and Olivas was nearby. Tafoya fired a single and fatal gunshot to the head of Olivas. Tafoya ran away.

Lynia ran to a neighbor's house screaming that someone had shot her mother. A party was in progress in the area and, although the neighbor heard a loud bang, did not believe it was a gunshot. The neighbor called 911. Lynia told the 911 operator that Juan came into her house, asked if Mary Ann (Olivas) was there, and shot Olivas with a gun.

The murder remained unsolved until 2007. In early 2007, Tafoya became a suspect when sheriff's deputies received an anonymous tip that he was involved in the homicide. Tafoya was a parolee and, on April 20, 2007, parole agents conducted a parole search of his home. Tafoya was arrested for parole violations discovered during the search. On May 9, 2007, Tafoya was placed in a temporary holding cell with two undercover sheriff's deputies posing as inmates. The deputies had been instructed to solicit information from Tafoya regarding the Olivas murder.

At the suggestion of the undercover deputies, Tafoya believed he had been placed in a temporary holding cell to receive notice that an additional charge was being filed against him. Tafoya told the deputies that if the additional charge "is something big, dawg . . . I'm pretty much fucked, dawg." Tafoya stated that he did not have any strikes, but "if it's for something that I know, then, yeah, it's pretty much through you know." A deputy referred to the possibility that the additional charge might be murder and, without mentioning Olivas by name, Tafoya stated, "I really doubt they could get me on that so, 'cause everything's gone. *Cuete* (gun), trash. My clothes, trash. Everything, there's no casings, that shit's trashed." Tafoya stated that he broke the gun into pieces, threw away the bullet casing and, because he used a revolver, no bullet casing had been left at the scene. He stated that no one had seen him, and that a party in the neighborhood would

have made it difficult for anyone to have heard the gunshot. He also stated that the murder occurred "something like" a year earlier.

Tafoya was then removed from the holding cell and received a fake additional charge slip charging him with the Olivas murder. When told he was being charged with the murder of "Deserie's mother," he stated that he did not know Deserie.

Tafoya was then returned to the holding cell and resumed his conversation with the undercover sheriff's deputies. Tafoya told them that he was being charged with murder, and would "jump on" any plea agreement that did not include a life sentence. He whispered that he had killed someone and formed his hand to resemble a gun. They talked about possible evidence against him and what his story would be. Tafoya stated he would deny the murder and, baring any eyewitness identification, he did not think there would be enough evidence against him.

Tafoya made telephone calls from the jail to his girlfriend during which he attempted to arrange for his girlfriend to provide an alibi. Tafoya stated that he was worried about being identified by a person. The girlfriend asked if the person was young, and Tafoya stated, "you already know who it is, babe."

DISCUSSION

No Error in Denial of Suppression Motion

Tafoya contends that the trial court erred in denying his motion to suppress the statements he made to undercover sheriff's deputies while he was in jail for parole violations. He argues that his arrest violated a regulation of the Board of Prison Terms² concerning the detention of parolees and, therefore, constituted an unlawful seizure of his person in violation of the Fourth Amendment.

In reviewing a ruling on a motion to suppress, we defer to the trial court's factual findings, but independently review the trial court's application of the law to the facts. (*People v. Hughes* (2002) 27 Cal.4th 287, 327.) We conclude that the arrest of

² The Board of Prison Terms regulations are set forth in division 2 of title 15 of the California Code of Regulations and sometimes will be referred to as the "BPT Regulations" in this opinion.

Tafoya did not violate any BPT Regulation or otherwise violate his Fourth Amendment rights and, therefore, the trial court properly denied his suppression motion.

Tafoya's argument is based on BPT Regulations regarding parole "holds." (Cal. Code Regs., tit. 15, §§ 2600-2606.)³ A parole agent may arrest and detain a parolee for a suspected parole violation and place the parolee on a "parole hold" prior to a revocation hearing. (*Id.*, at §§ 2600, 2601; *People v. Hunter* (2006) 140 Cal.App.4th 1147, 1153; *Terhune v. Superior Court* (1998) 65 Cal.App.4th 864, 871, fn. 4.) A parole hold must be reviewed within a prescribed time to determine whether it should be continued. (Cal. Code Regs., tit. 15, § 2603, subd. (a).)⁴ "Once a parole hold is dropped, it should not be replaced unless new information has been received which indicates that the parolee falls within Section 2601." (*Id.*, at subd. (b).)

Here, on April 20, 2007, Tafoya was arrested and placed on a parole hold for parole violations consisting of possession of a knife and nunchakus, possession of spent shell casings, and firing a weapon in his garage. On April 30, a supervising parole agent released Tafoya based on a report that referred to the nunchakus and spent shell casings, but failed to mention Tafoya's possession of a knife or shooting a gun in his garage. When sheriff's deputies informed the supervising parole agent of the omissions in the report, Tafoya was re-arrested on May 1 and again placed on parole hold. Tafoya's jailhouse statements to the undercover deputies were made after the second arrest.

³ A "hold" is defined by BPT Regulations as "[a] request by a department employee that a parolee be held in custody until further notice. . . ." (Cal. Code Regs., tit. 15, § 2000, subd. (b)(54).)

⁴ California Code of Regulations, title 15, section 2603 provides in its entirety: "Review of a Parole Hold. [¶] (a) Initial Review. As soon as possible, but no later than 4 days after the placement of a parole hold, the parole agent must have a case conference with the unit supervisor to determine whether the parole hold should be continued. [¶] (b) Replacing a Parole Hold. Once a parole hold is dropped, it should not be replaced unless new information has been received which indicates that the parolee falls within Section 2601. If the parole hold is replaced, the parolee shall be given the reasons in writing as provided in Section 2604. [¶] (c) Later Removal of a Parole Hold. In appropriate cases, the district administrator may later remove a parole hold. [¶] (d) Board Review. The board is authorized to order a parole hold placed, replaced, or removed at any time. The board decision regarding a parole hold is final. On a semi-annual basis the P&CSD shall provide the board information regarding the use of parole holds."

Tafoya contends that his second arrest violated BPT Regulation 2603, subdivision (b) stating that a "dropped" parole hold "should not be replaced unless new information has been received" He claims his initial parole hold ended when he was released on April 30 and was replaced after his second arrest on May 1, and that, because the holds following both arrests were based on the same parole violations, no "new information ha[d] been received" to support the second hold. We disagree.

The word "should" in BPT Regulation 2603, subdivision (b) is advisory, not mandatory. The "Rules of Construction" section of the BPT Regulations provides that the word "[s]hall" is mandatory, 'should' is advisory, and 'may' is permissive." (Cal. Code Regs., tit., 15, § 2000, subd. (a)(5).) Accordingly, the language that a parole hold "should" not be replaced without new information is an advisory policy, and not a mandatory requirement that renders a replacement hold without new information invalid or unlawful. Tafoya argues that this court construes the word "should" as a mandatory requirement, but does not claim that the Board of Prison Terms' own definition is unreasonable, arbitrary, or in excess of the Board's statutory authority.

Also, the word "should" is generally construed to be permissive or advisory in other statutory and regulatory contexts. (See, e.g., *Kucera v. Lizza* (1997) 59 Cal.App.4th 1141, 1151-1152; *Boam v. Trident Financial Corp.* (1992) 6 Cal.App.4th 738, 745, fn. 6.) In general, when a regulation does not provide a penalty or consequence for noncompliance, regulatory language should be considered directory rather than mandatory. (See *In re M.F.* (2008) 161 Cal.App.4th 673, 680 [dealing with statutory language]; *In re Melinda J.* (1991) 234 Cal.App.3d 1413, 1419 [same].)

Moreover, the record shows that the initial parole hold was dropped by the supervisory parole agent based on a report that understated the number and nature of Tafoya's parole violations. And, an error in communication and record-keeping provides a reasonable basis for deviating from the advisory policy of requiring "new information" before a replacement parole hold is instituted.

Although the absence of "new information" does not automatically render a replacement hold invalid or unlawful, Tafoya argues that the second arrest and parole

hold were arbitrary and undertaken for purposes of harassment in this case. A parole search does not require reasonable suspicion, but could become unconstitutionally unreasonable if conducted arbitrarily or for purposes of harassment. (*People v. Reyes* (1998) 19 Cal.4th 743, 752-754.) For example, a parole search may be unreasonable if conducted repeatedly or at an unreasonable hour, or if it is unreasonably prolonged. (*Id.*, at pp. 753-754.)

Nothing in the record supports the conclusion that Tafoya's second arrest and parole hold were unreasonable, arbitrary, or harassing in any manner. There is no dispute that Tafoya was, in fact, in violation of the terms of his parole or that he could have been arrested and detained on a parole hold until a revocation hearing.

No Error in Jury Polling

Tafoya contends that the trial court erred by not ordering further deliberations after one juror indicated during polling that she was not convinced she agreed with the written verdict. (§ 1163.) We disagree.

Every criminal defendant is entitled to a unanimous jury verdict. (Cal. Const., art. I, § 16; *People v. Crow* (1994) 28 Cal.App.4th 440, 445; *Chipman v. Superior Court* (1982) 131 Cal.App.3d 263, 266.) To assure that the verdict expresses the unanimous judgment of all jurors, any juror is empowered to declare, up to the last moment, that he or she dissents from the verdict. (*Chipman*, at p. 266; *People v. Thornton* (1984) 155 Cal.App.3d 845, 858-859.) Accordingly, after a written verdict is announced, either party may request a polling of each juror to determine whether the verdict is his or her verdict. If any juror answers "in the negative, the jury must be sent out for further deliberation." (§ 1163.)⁵ The polling procedure allows the court to determine whether the written verdict form is the "true verdict" of every juror, or the "product of mistake or unduly precipitous judgment." (*Thornton*, at p. 859.) The trial court's decision to order or not order further deliberation pursuant to section 1163 is

⁵ "When a verdict is rendered, and before it is recorded, the jury may be polled, at the request of either party, in which case they must be severally asked whether it is their verdict, and if anyone answer in the negative, the jury must be sent out for further deliberation." (§ 1163.)

reviewed for abuse of discretion. (See *People v. Superior Court (Thomas)* (1967) 67 Cal.2d 929, 932-933; *People v. Wattier* (1996) 51 Cal.App.4th 948, 955-956.) We conclude that there was no abuse of discretion in this case.

Here, the written verdict that was signed by the foreperson in the jury room was read by the clerk and the jurors collectively stated that it was their verdict. The jurors were then polled at Tafoya's request. The court asked Juror No. 1, "is that your verdict and are those your findings?" After pausing for what the court stated was "a minute to two minutes," Juror No. 1 said, "I am sorry," and that "they are not my findings." When the court asked her what she meant, Juror No. 1 responded, "I'm not convinced."

The court stated that it might be required to send the jury back for further deliberations, but decided to explore the response of Juror No. 1 first. The court asked Juror No. 1 if there was a problem because "you sat there silent for a long period of time." Juror No. 1 stated that she was "not fine to go forward." The court asked her to "relax a little bit," and noted she was crying. Juror No. 1 stated that "I feel like I must be having a panic attack or something." The court suggested that she "put [her] head down for a second, take a few deep breaths," and indicated that someone was getting her water. The court asked her to state when she was able to continue.

When Juror No. 1 stated she was able to continue, the court asked her whether the written guilty verdict returned by the jury was her verdict. Juror No. 1 responded, "Yeah, that's my verdict." The court asked her if she was "sure this is [her] verdict," stating that "no one is trying to push you or anyone else into a decision" Juror No. 1 stated she did not need more time to compose herself and that, "I'm sure that's my verdict." The court again asked her if she needed more time to think. She said no, and repeated that the written verdict was her verdict. A few minutes later, she was asked a final time whether the verdict was her verdict and she again said yes.

After the other jurors were polled, the clerk recorded the verdict. Defense counsel moved for a mistrial, but did not request the court to order further deliberations.⁶

Considering the delayed response by Juror No. 1, her professed emotional state and the hesitant and uncertain nature of her initial statements, the trial court did not abuse its discretion by allowing her a period of time to compose herself, and then asking her again whether the written verdict was her verdict. There is nothing in the record to show that the court improperly influenced or pressured Juror No. 1 during the incident. As the trial court stated, when Juror No. 1 composed herself, she unequivocally and repeatedly indicated that the written verdict was her verdict.

Ultimately, whether the jury's written verdict truly reflected Juror No. 1's individual verdict is a factual question the trial court was required to decide. "Where, as here, a juror makes equivocal or conflicting statements as to whether he has assented to the verdict freely and voluntarily, a direct question of fact within the determination of the trial judge is presented. The trial judge has the opportunity to observe the subtle factors of demeanor and tone of voice which mark the distinction between acquiescence and evasion of individual choice." (*People v. Superior Court (Thomas)*, *supra*, 67 Cal.2d at p. 932; see also *People v. Carrasco* (2008) 163 Cal.App.4th 978, 986-991.)

Petition for Disclosure of Juror Names

Tafoya contends that the trial court erred in denying his petition to disclose juror information to assist in preparing a motion for new trial based on juror misconduct. We disagree.

Following a verdict, a defendant may "petition the court for access to personal juror identifying information within the court's records necessary for the defendant to communicate with jurors for the purpose of developing a motion for new trial or any other lawful purpose." (Code Civ. Proc., § 206.) "The petition shall be

⁶ Respondent argues that Tafoya waived the issue on appeal by failing to object to the trial court's acceptance of the written verdict without ordering further jury deliberations. (*People v. Wright* (1990) 52 Cal.3d 367, 415; *People v. Flynn* (1963) 217 Cal.App.2d 289, 294-295.) We conclude there was no waiver because, although no formal objection was made, the issue of further deliberations was raised and discussed.

supported by a declaration that includes facts sufficient to establish good cause for the release of the juror's personal identifying information. The court shall set the matter for hearing if the petition and supporting declaration establish a prima facie showing of good cause for the release" of the requested information. (Code Civ. Proc., § 237, subd. (b).)

Good cause for disclosure of juror information to support a motion for new trial based on juror misconduct is "a sufficient showing to support a reasonable belief that jury misconduct occurred." (*People v. Rhodes* (1989) 212 Cal.App.3d 541, 551-552; *People v. Jefflo* (1998) 63 Cal.App.4th 1314, 1322.) There is no good cause where allegations of jury misconduct are speculative, conclusory, or unsupported, or the alleged misconduct is not "of such a character as is likely to have influenced the verdict improperly." (Evid. Code, § 1150; see *Rhodes*, at p. 552.) We review the denial of a petition for disclosure for an abuse of discretion. (*People v. Jones* (1998) 17 Cal.4th 279, 317.) The trial court did not abuse its discretion in denying Tafoya's motion.

Tafoya claims a reasonable belief that jury misconduct occurred was established by the incident with Juror No. 1 during jury polling. He argues that the incident raised an inference of at least the possibility that something had occurred during jury deliberations to cause Juror No. 1 to cast a vote for a guilty verdict despite her lack of conviction as expressed in the courtroom. We disagree and conclude that Juror No. 1's initial reluctance to join in the verdict does not support an inference of possible jury misconduct. The record shows Juror No. 1 was uncertain and upset, but does not suggest coercion or influence by other jurors or anyone else during deliberations.

Moreover, Tafoya fails to show how any conduct by the jury is "of such a character as is likely to have influenced the verdict improperly." (Evid. Code, § 1150, subd. (a).) "[J]urors can be expected to disagree, even vehemently, and to attempt to persuade disagreeing fellow jurors by strenuous and sometimes heated means." (*People v. Johnson* (1992) 3 Cal.4th 1183, 1255.) A verdict may not be impeached by inquiry into the jurors' mental processes. (*People v. Steele* (2002) 27 Cal.4th 1230, 1261.)

The judgment is affirmed.
NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

Charles Horan, Judge
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